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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

TERESA BALLARD, ET AL.,

Petitioners,

v.

SHEILA MARTIN AND WESTARK FINANCIAL CONSULTANTS OF JONESBORO, INC., ET AL.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does due process require the adoption and use of objective standards to gauge whether a trial court abused its discretion in approving a proposed class action settlement agreement?

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are Teresa Ballard, Kenisha Bryant, Richard Lynn and Cheryl King, individual citizens of the United States. Ms. Ballard and Ms. King reside in the State of Arkansas and Ms. Bryant resided there at the time this litigation commenced. The Petitioners have no corporate affiliations. The Petitioners were objecting class members in the Circuit Court of Craighead County, Arkansas and the Appellants before the Arkansas Supreme Court.

Respondents

Sheila Martin and Jimmie Lou Spencer are individual citizens of the United States, residing in the State of Arkansas. Ms. Martin and Ms. Spencer were the designated class representatives in the Circuit Court of Craighead County, Arkansas and Appellees before the Arkansas Supreme Court.

Westark Financial Consultants of Jonesboro, Inc., Westark Financial Consultants of Little Rock, Inc., Westark Financial Consultants of North Little Rock, Inc.; Westark Financial Consultants of Jacksonville, Inc.; Westark Financial Consultants of Pine Bluff, Inc.; Westark Financial Consultants of Rogers, Inc.; Westark Financial Consultants of Springdale, Inc.; Westark Financial Consultants of Russellville, Inc.; Westark Financial Consultants of Fayetteville, Inc.; Westark Financial Consultants, Inc.; Cash Advance of Benton, Inc.; Cash Advance of North Little Rock, Inc.; Cash Advance of Little Rock, Inc.; Executive Cash Advance of Little Rock, Inc.; C & B Enterprises, Inc., H&S Enterprises of Rogers, Inc.; H&S Enterprises of Fayetteville, Inc.; H&S Enterprises of Springdale, Inc.; and Payday Advance of Fort Smith, Inc. (collectively, "Westark") are all Arkansas corporations. Westark was the defendant in the

Circuit Court of Craighead County, Arkansas and an appellee before the Arkansas Supreme Court.

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Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The original opinion of the Arkansas Supreme Court (App. A at 1a) is reported at 349 Ark. 564, 79 S.W.3d 838 (2002). The opinion of the Circuit Court of Craighead County, Arkansas approving the proposed Settlement Agreement over the objection of the Petitioners (App. B at 23a) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Arkansas Supreme Court was entered July 5, 2002.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

1. U. S. Const., Amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation.

2. U. S. Const., Amend. XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Ark. Const., Art. 19, § 13.

§ 13 Maximum lawful rates of interest.

(a) General Loans:

(i) The maximum lawful rate of interest on any contract entered into after the effective date hereof shall not exceed five percent (5%) per annum above the Federal Reserve Discount Rate at the time of the contract.

(ii) All such contracts having a rate of interest in excess of the maximum lawful rate shall be void as to the unpaid interest. A person who has paid interest in excess of the maximum lawful rate may recover, within the time provided by law, twice the amount of interest paid. It is unlawful for any person to knowingly charge a rate of interest in excess of the maximum lawful rate in effect at the time of the contract, and any person who does so shall be subject to such punishment as may be provided by law.

(b) Consumer Loans and Credit Sales: All contracts for consumer loans and credit sales having a greater rate of interest than seventeen percent (17%) per annum shall be void as to principal and interest and the General Assembly shall prohibit the same by law.

(c) Definitions: As used herein, the term:

(i) "Consumer Loans and Credit Sales" means credit extended to a natural person in which the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes.

(ii) "Federal Reserve Discount Rate" means the Federal Reserve Discount Rate on ninety-day commercial paper in effect in the Federal Reserve Bank in the Federal Reserve District in which Arkansas is located.

(d) Miscellaneous:

(i) The rate of interest for contracts in which no rate of interest is agreed upon shall be six percent (6%) per annum.

(ii) The provisions hereof are not intended and shall not be deemed to supersede or otherwise invalidate any provisions of federal law applicable to loans or interest rates including loans secured by residential real property.

(iii) The provisions hereof revoke all provisions of State law which establish the maximum rate of interest chargeable in the State or which are otherwise inconsistent herewith.

4. Ark. R. Civ. P. 23.

RULE 23. CLASS ACTIONS

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this section may be conditional and it may be altered or amended before the decision on the merits.

(c) Notice. In any class action in which monetary relief is sought, including actions for damages and restitution, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall: (1) describe the action and the members' rights in it; (2) advise each member that the court will exclude the member from the class if the member so requests by a specified date; (3) advise each member that the judgment, whether favorable or not, will include all members who do not request exclusion; and (4) state that any member who

does not request exclusion may, if the member desires, participate in the litigation, either in person or through counsel. The cost of such notice shall be borne by the representative parties; provided, however, that the court may shift all or part of such cost to the opposing party or parties if the case is settled or the class representative substantially prevails on the merits.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of the members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; and (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 and may be altered or amended from time to time as may be desirable.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. In cases where the court has entered an order that an action shall be maintained as a class action, notice of such proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

This appeal arises from an order of the Circuit Court for Craighead County, Arkansas, the Hon. David N. Laser, approving, over Petitioners' objection, a proposed class action Settlement Agreement. (App. B at 23a.)

The case began on December 8, 2000 as a suit by Ms. Martin and Ms. Spencer (collectively, the "Plaintiffs") against Westark Financial Consultants of Jonesboro, Inc. for usury in the practice of payday lending. On April 26, 2001, all of the other corporate defendants were added as defendants (collectively referred to herein as "Westark"). On April 27, 2001, the Plaintiffs and Westark submitted their "Joint Motion to Certify Class, Approve Settlement of Class Action, Direct Notice of Pendency and Settlement, and Set Date for Hearing on Final Approval of Settlement of Class Action." (App. D at 34a.) Attached to the Joint Motion as Exhibits were the Settlement Agreement (App. D at 39a), the Notice to class members of certification and settlement (App. D at 45a), and the Claim Form to be used by class members (App. D at 55a). The proposed Settlement Agreement settled all claims that were brought or could have been brought against Westark, its owners and sureties in exchange for a payment of $170.000.00 in class counsel fees and $435,000.00 used to purchase "Series E" U. S. Savings Bonds. Westark would continue in business for 90 days after approval of the settlement and would continue to collect on checks thereafter if a payment plan was in effect as to that check.

On April 30, 2001, the trial court certified the case as a class action, and ordered that simultaneous notice of certification and settlement be given by U. S. Standard Mail on or before May 14, 2001. The Petitioners timely objected to the proposed Settlement Agreement as being inadequate, unreasonable, and unjust. An evidentiary hearing was held in the trial court on June 1, 2001. At that hearing, Ms. Martin testified in support of the fairness of the Settlement Agreement and the Plaintiffs rested. Westark offered no evidence in support of the Settlement Agreement.

Petitioners called Westark's chief financial officer as a witness pursuant to a subpoena and elicited evidence regarding the financial condition of Westark, its shareholders and sureties. That evidence showed that: Westark's only substantial activity was payday lending; that Westark had a combined net worth of approximately $ 2.7 million; that Westark would collect approximately $ 1.4 million during the 90-day post-approval period; that Westark's shareholders had taken some $ 3-5 million in profits out of the corporations during their existence; and that Westark had surety bonds totaling $ 1.95 million to cover, *inter alia*, violations of "any other applicable laws of the State [sic]Arkansas."

Petitioners argued that the amount offered to the class was inadequate and unfair and that the owners and sureties should not be released from potential liability without some contribution on their part to the settlement fund. In addition, Petitioners objected to the Notice's less-than-two-week timing and its content.

On August 7, 2001, the trial court approved the Settlement Agreement. On August 28, 2001, the Petitioners timely appealed that order. On July 5, 2002, the Arkansas Supreme Court upheld the decision of the trial court. The Arkansas Supreme Court was asked to adopt - for the first time - standards by which to judge proposed class action settlements. Petitioners allege the Arkansas Supreme Court nominally adopted such standards, but has substantively ignored them, resulting in a denial of due process in this particular case and the promise of continued denials of due process in the procedural vacuum inherent in its decision.

The Petitioners raised the federal question of due regarding the standards applicable to review of proposed class action settlement agreements and Notices as indicated below:

> When determining whether a proposed settlement agreement should be approved, the burden is on the

proponents of the agreement to show that it is fair, reasonable, and adequate. *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3rd Cir. 1995). The burden is not on the objectors to prove it is unacceptable. This makes sense since it is *the proponents* who allegedly possess all of the facts underlying the negotiations and who stand to benefit from the agreement. Moreover, since the proposed settlement is intended to have *res judicata* effect as to the absent class members and class counsel bears a duty toward the class, it is only right that class counsel be called upon to demonstrate that the proposed settlement was the subject of vigorous and independent negotiation on behalf of the class. Due process requires nothing less. This Court has previously held that due process considerations are relevant in the class action context. *See*, e.g., *Kemp-Bradford VFW Post 4764 v. Wood*, 262 Ark. 168, 554 S.W.2d 344 (1977) ("We do not believe the rights of the members of any class, whether alcoholic beverages are involved or not, should ever be determined without reasonable notice or without evidence that parties are adequately representative of the class."); *Ford Motor Credit Co. v. Rogers*, 285 Ark. 64, 685 S.W.2d 145 (1985)."

Ballard Appellants' Opening Brief. See Ballard, et al., v. Martin, et al., SC 01-1185 (Ark.). (Emphasis added.)

4. That the Official Notice from the Court and the Notice and Summary from the parties contain no reference whatsoever that: (1) a class member may object at all; (2) "the manner by which a notice of objection should be prepared, filed and delivered;" or (3) the manner and time at which objections to the proposed Settlement Agreement shall be heard.

5. That Kenisha Bryant, Cheryl King, Richard Lynn and Crystal Luebbers object to approval of the proposed Settlement Agreement on the grounds,

inter alia, it is woefully inadequate, unfair and unjust to the class members."

Objection of Proposed Intervenors, Teresa Ballard, et al., to Proposed Settlement Agreement, CIV 2000-669(L) (Craighead Co., Ark.).

REASONS FOR GRANTING THE PETITION

I. The Question Presented is Important.

A. The Arkansas Supreme Court's Decision Results in a Denial of Due Process.

Prior to this decision by the Arkansas Supreme Court, there were no enunciated opinions in Arkansas to guide litigants and trial courts in evaluating proposed class action settlement agreements. In line with its stated policy to follow federal law in the area of class action practice (*Fraley v. Williams Ford Tractor and Equipment Company,* 339 Ark. 322, 336, 5 S.W.3d 423, 432 (1999)), the court was asked to adopt *Grunin v. Int'l House of Pancakes,* 513 F.2d 114 (8th Cir. 1975) as the law of Arkansas in this area.

The Arkansas Supreme Court, in a published opinion, did nominally adopt *Grunin, id.* as controlling, but proceeded to misinterpret and misapply it, resulting in a denial of due process. The future "ripple effect" of this error will deny other objecting class members due process if it is not corrected at the outset.

1. Due Process Requires the Use of Objective Standards Against Which to Measure and Limit a Court's Discretion.

Petitioners believe the review standards set forth in *Grunin* and other similar cases from other federal circuits have as their base the due process clause of the Fifth

Amendment. At the core of this consideration is the due process concern that judicial proceedings to which one is not a party are not generally binding on that person, unless the named party adequately represents the interests of that absent person. This general rule and the exception for representative actions have deep roots in our system of justice.

> With a proper regard for divergent local institutions and interests, cf. *Jackson County v. United States*, 308 U.S. 343, 351, 60 S.Ct. 285, 288, 84 L.Ed. 313, this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 235, 17 S.Ct. 581, 584, 41 L.Ed. 979

Hansberry v. Lee, 311 U.S. 32, 42, 61 S.Ct. 115, 118, 85 L.Ed. 22, 132 A.L.R. 741 (1940).

> In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.

Smith v. Swormstedt, 57 U.S. 288, 303, 16 How. 288, 14 L.Ed. 942 (1853). *See also Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 41 S.Ct. 338, 341 (1921).

Due process, therefore, requires adequate representation of the absent class members' interests. When the nominal parties agree to settle, the court by necessity becomes the representative of the absent parties in its fiduciary role on their behalf.

> The inquiry appropriate under Rule 23(e), on the other hand, protects unnamed class members "from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." See 7B Wright, Miller, & Kane § 1797, at 340-341.

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623, 117 S.Ct. 2231, 2249 (1997). This statement merely begs the question of whether objective standards – or any standards at all – are required under the due process clause. Petitioners submit objective standards *are* needed in order to assure adequacy of representation by the Court, as fiduciary, when the class representative is advocating settlement. The absence of objective standards makes exercise of that fiduciary duty inherently arbitrary, which results in a denial of due process to the absent class members.

> This expanded role of the court in class actions (relative to conventional bipolar litigation) continues even after certification. While the parties in a normal suit do not ordinarily require a judge's approval to settle the action, class action parties do. Rule 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed.R.Civ.P. 23(e). Courts and commentators have interpreted this rule to require courts to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." 2 Newberg & Conte § 11.41, at 11-88 to 11-89. "Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class

> members.... [T]he court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975); Malchman *v. Davis*, 706 F.2d 426, 433 (2d Cir.1983); *Sala v. National RR Passenger Corp.*, 721 F.Supp. 80 (E.D.Pa.1989); see also *Piambino v. Bailey*, 610 F.2d 1306 (5th Cir.), *cert. denied*, 449 U.S. 1011, 101 S.Ct. 568, 66 L.Ed.2d 469 (1980).

In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 785 (3rd Cir. 1995).

These principles apply to state court proceedings through the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680, 50 S.Ct. 451, 454 (Mem), 74 L.Ed. 1107 (1930), *Richardson v. Ramirez*, 418 U.S. 24, 39-40, 94 S.Ct. 2655, 2664, 41 L.Ed.2d 551 (1974); *Hansberry v. Lee, supra, Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799, 93 A.LR.2D 733 (1963). The federal constitutional issues of due process were timely raised by the Petitioners and were ruled upon by the Arkansas Supreme Court, thereby allowing this Court to exercise jurisdiction in this matter. *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979).

In determining what is due process of law, regard must be had to substance, not to form. *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230. Rather, the phrase expresses the requirement of "fundamental fairness,"

> a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Department of Social Services of Durham County, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

With these rules in mind, how do the proceedings in Arkansas square with them? First, the Arkansas Supreme Court explicitly stated it was adopting the reasoning of *Grunin v. Int'l House of Pancakes*, 513 F.2d 114 (8th Cir. 1975). The evidence presented by the Petitioners showed that the total potential judgment on usury claims alone could have been as high as $ 27 million. The Arkansas Supreme Court recognized Petitioners had made a "bona fide" argument that the $ 605,000.00 offered in settlement was not comparable to the potential recovery, but then stated "...we are not deciding the merits of the usury question in their favor ... [n]or can we proceed in our analysis with <u>any assumption</u> that the class will prevail and collect all damages claimed." (Emphasis added.) *Ballard v. Martin*, 349 Ark. 564, 578, 79 S.W.3d 838, 846-47 (2002). In essence, the Arkansas Supreme Court abdicated its reviewing role, by doing so, discarded this first and most important element of analysis. *Some* assumptions regarding the likelihood of the class prevailing on their admittedly "bona fide" claims was necessary in order to place a value on those claims for purposes of comparison to the settlement offer.

The Arkansas Supreme Court then turned to the second, subsidiary *Grunin* factor - the defendant's ability to pay.[1] Here, the court improperly balanced the evidence elicited by

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[1] The Arkansas Supreme Court discussed this issue in the context of the first factor, as well, but that discussion will be addressed by Petitioners exclusively under the second ability-to-pay factor.

Petitioners in the record against Westark's disputed claims in its pleadings. Petitioners introduced evidence that Westark's ability to pay greatly exceeded the $ 605,000.00 offered while Westark introduced *no evidence whatsoever* that its ability to pay was impaired. In fact, the evidence showed that during the 90-day post-approval operations period, Westark could expect to collect some $ 1.4 million from the class members. The court looked to *In re Milken & Assoc. Securities Litigation*, 150 F.R.D. 46 (S.D.N.Y. 1993) for justification that a settlement that is much smaller than the amount sought in the complaint may be fair and reasonable and then said "a settlement which embraces Series EE Bonds totaling $870,000 and forgiveness of debt after ninety days has considerable value." *Ballard, supra* at 349 Ark. at 580, 79 S.W.3d at 848. Of course, *Milken* and its kind deal with cases where analysis of the first factor show that the value of the class's claims are worth much less than the amount sought and confirm that the ability-to-pay factor is subsidiary to the first factor (value of the claims versus amount offered). Here, the court uses the value of the savings bonds *sixteen years hence* to improperly justify the supremacy of the second factor over the first.

Moreover, the Arkansas Supreme Court *completely ignored* any analysis of the value of other claims that were not brought, but that were being released, as well as the value of claims that could have been brought against Westark's owners and sureties (who were also being released *without* consideration) and their ability to pay.

If the Respondents seek to justify the Settlement Agreement on the basis that there is a limited fund, then this Court's opinion in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) is instructive. *Ortiz* makes it clear that strict proof that the fund is limited - otherwise than by the settlement agreement itself - is required. *Id.* at 838-42. Failure to meet that burden of proof demonstrates an absence of adequate representation and requires rejection of the proceedings below.

The defect of certification going to the most characteristic feature of a limited fund action was the uncritical adoption by both the District Court and the Court of Appeals of figures [FN omitted] agreed upon by the parties in defining the limits of the fund and demonstrating its inadequacy. [FN omitted] When a district court, as here, certifies for class action settlement only, the moment of certification requires "heightene[d] attention," *Amchem,* 521 U.S., at 620, 117 S.Ct. 2231, to the justifications for binding the class members. This is so because certification of a mandatory settlement class, however provisional technically, effectively concludes the proceeding save for the final fairness hearing. And, as we held in *Amchem,* a fairness hearing under Rule 23(e) is no substitute for rigorous adherence to those provisions of the Rule "designed to protect absentees," *ibid.,* among them subdivision (b)(1)(B). [FN omitted] Thus, in an action such as this the settling parties must present not only their agreement, but evidence on which the district court may ascertain the limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge, see *In re Bendectin Products Liability Litigation,* 749 F.2d 300, 306 (C.A.6 1984) ("[T]he district court, as a matter of law, must have a fact-finding inquiry on this question and allow the opponents of class certification to present evidence that a limited fund does not exist"); see also *In re Temple,* 851 F.2d 1269, 1272 (C.A.11 1988) ("Without a finding as to the net worth of the defendant, it is difficult to see how the fact of a limited fund could have been established given that all of [the defendant's] assets are potentially available to suitors"); *In re Dennis Greenman Securities Litigation,* 829 F.2d 1539, 1546 (C.A.11 1987) (discussing factual findings necessary for certification of a limited fund class action).

Ortiz v. Fibreboard Corp., 527 U.S. 815, 848-50, 119 S.Ct. 2295, 2316, 144 L.Ed.2d 715 (1999).

In short, when the Arkansas Supreme Court uncritically adopted the trial court's assessment that Westark had only a limited fund with which to pay claims, without evaluating *at all* the ability of its owners or sureties to pay and the value of released, but unbrought, claims against them, the process was fundamentally flawed. It was the substance of the proceeding, not the nominal adoption of objective standards, that resulted in a denial of due process. Dismissal of non-parties for claims not brought and for no independent consideration deserves a deeper examination and specific findings. *Girsh v. Jepson*, 521 F.2d 153, 159 (3rd Cir. 1975).

2. The Arkansas Supreme Court Improperly Shifted the Burden of Proof to Objecting Class Members.

The Arkansas Supreme Court opinion effectively shifted burden of proof from the Plaintiffs and Westark to the Petitioners. The record was clear that they had utterly failed to meet their burden with admissible proof. They provided *no evidence whatsoever* of: (1) the value of the usury claim by introducing the amount of fees collected from class members during the class period or the number of class members; (2) their ability to pay; (3) the value of other claims being released that could have been, but were not, brought; (4) the value of claims being released as to Westark's owners and sureties that could have been, but were not, brought; or (5) the ability of Westark's owners and sureties to pay.

The court excuses this lack of proof by Respondents by balancing the evidence against Westark's claims in its pleadings:

> Following the filing of the complaint, Martin commenced discovery. Through one set of interrogatories and requests for production

> propounded by Martin, information about the arbitration provisions in the customer contracts was elicited. Martin did request limited information relating to Westark's financial condition. However, it is unclear from the record whether Martin ever received this information.

Ballard, supra at 349 Ark. at 572, 79 S.W.3d at 842. (Emphasis added.)

> The Westark appellees dispute these figures. They also claim that they have little cash on hand and that operating overhead reduces the amount available for the settlement fund. We do not consider the disputed claim that the Westark appellees could have paid more than $605,000 to be a persuasive reason for overturning the settlement.

Ballard, supra at 349 Ark. at 582, 79 S.W.3d at 848-49. (Emphasis added.)

This shifting of the burden of proof to the Petitioners effectively changes the inquiry from one where the proponents of the Settlement Agreement are required to positively prove the its adequacy to one where the objecting class members are required to prove it inadequate. This shift denies them due process in that it puts them at odds with the reviewing court. In other words, the objecting class members are charged with the burden of persuading the very fiduciary - the court - who is supposed to be looking out for their interests and incorrectly requires them to overcome an faulty presumption that the proposed settlement is fair. It should be the Plaintiffs and Westark, in this case, who carry that burden because the Plaintiffs have arguably abandoned their adversarial posture with Westark and no longer adequately represent the class' interests.

3. The Time Period for Notice was Too Brief to Afford Class Members Due Process.

The Respondents were ordered by the trial court to mail notice to class members on or before May 14, 2001. Notice was actually mailed on May 16, 2001 using U. S. Standard Mail. The deadline for a class member to object to the proposed Settlement Agreement was May 29, 2001. The fairness hearing was set for June 1, 2001.

Notice to class members must be reasonably calculated to apprise them of their rights. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173, 94 S.Ct. 2140, 2150, 40 L.Ed.2d 732 (1974). *See also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

While notice in this case was mailed to class members, it was mailed using U. S. Standard Mail. That method of mailing excludes forwarding by the Postal Service and means that, if the class member has changed address, the class member will not receive the Notice even if she has left forwarding instructions with the Postal Service. Moreover, given the brief window of time between later mailing of the notices on May 16 and the fairness hearing on June 1, 2001, those notices that required forwarding likely would not have arrived until just before the time to object to the proposed settlement expired, or even later. As to those class members, therefore, they had either no notice whatsoever of the proceedings or an inadequate opportunity to object and present evidence.

The Arkansas Supreme Court recognized those problems and dismissed them as inconsequential. The court said:

> Martin, in her mailing to class members, claims that she requested return service for undeliverable notices at an additional cost. This was for the purpose of forwarding the notice to transient class members, according to Martin. Ballard and Cain reply that nothing regarding remailing returned notices to new

addresses is in the record. But what the record does support is that forwarding addresses were requested by Martin at an added cost which presupposes this was for the purpose of remailing. Though, a forwarded notice may have been too late for the June 1 fairness hearing, it certainly was timely notice of the right to opt out of the class.

Ballard, supra at 349 Ark. at 587-88, 79 S.W.3d at 852-53. (Emphasis added.)

The court apparently considered the presence of an opt-out provision and timely notice of that option alone to be a cure-all for any flaws existing in the notice and settlement agreement approval process. This is wrong. The class must have a reasonable opportunity to develop a record and oppose the proposed settlement and a lack of the best practicable notice to them of that right is a denial of their fundamental right. *Girsh v. Jepson*, 521 F.2d 153 (3rd Cir. 1975). If the settlement is inadequate, and their individual claims are small, what good is an opt-out to a class member?

Furthermore, the Notice is fundamentally flawed because it did not disclose that a class member could object or how or when he could do so. Additionally, the Notice did not disclose that Westark's owners and sureties - who were not defendants -were being released. See, e.g., *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222 (11th Cir. 1998).

B. The Impact of this Decision on Future Class Action Cases in Arkansas is Potentially Enormous.

This published opinion will affect all future class actions in Arkansas for which settlement is sought. Given the prospective impact of the published opinion from the Arkansas Supreme Court if this deficiency goes uncorrected, future *ad hoc* denials of due process are assured.

Arbitrary standards amount to no standards at all. Discretion becomes unfettered and leaves parties and courts with nothing to guide them. The due process concerns evident in the instant case will be magnified through time unless this Court exercises corrective action now.

II. This Court Has Never Spoken on this Issue and Guidance is Needed.

As near as can be determined, this Court has never explicitly stated that due process requires adherence to certain objective standards in the exercise of a trial court's discretion in approving a proposed class action settlement. Nor has this Court enumerated what those standards should be. This Court's opinion in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231 (1997) comes close in discussing 23(e), but does not categorically state that due process is at stake or that objective standards are there to gauge and limit the discretion of the trial court.

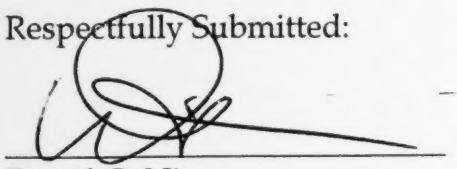
There is some precedent for the role of a trial court in representative actions to construe the standards for approval of settlement agreement as requirements for effective protection of absent claimants. *Protective Committee For Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 434-41, 88 S.Ct. 1157, 1168-73 (1968) involved appellate review of settlement agreement reached in a bankruptcy proceeding and discussed at length the appropriate standards required by the reviewing court and the justification for those standards. While not a "class action" *per se*, bankruptcy proceedings are equitable in nature and deal with a representative action that disposes of the rights of absent parties.

If it please the Court, this fundamental and important issue is important enough to warrant clarification.

CONCLUSION

For all of the above reasons, the Petitioners request this Court to grant Certiorari and to reverse and remand the decision of the Arkansas Supreme Court with instructions or guidance as to how to proceed.

Respectfully Submitted:



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APPENDIX

The Appendix is in a separate volume submitted herewith.